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No. 97 -

In The
Supreme Court of the United States
October Term, 1997

FRANCIS E. DADDARIO,
Petitioner,
v.
CAPE COD COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP, AMERICAN POLICY CENTER, CHICAGO CREATIVE INVESTORS ASSOCIATION, HOMEOWNERS AGAINST RENT KONTROLS, HOUSTON PROPERTY RIGHTS ASSOCIATION, ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION, MAINE CONSERVATION RIGHTS INSTITUTE, PROPERTY OWNING WOMEN, PROPERTY RIGHTS FOUNDATION OF AMERICA AND VIRGINIANS FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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Counsel for Amici Curiae
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Pursuant to Supreme Court Rule 37.2, counsel for Amici Curiae, who are employed by the New England Legal Foundation, have attempted to secure written consent for the filing of the attached Amici Curiae brief from counsel for Petitioner and Respondent. Although Petitioner Francis E. Daddario granted such consent, Respondent Cape Cod Commission withheld it. Accordingly, counsel for Amici Curiae hereby moves this Court for leave to file the Amici Curiae brief which is submitted herewith. Amici Curiae make this motion on the following grounds.

American Association for Small Property Owners is a national grassroots organization of small property owners. Currently, it has approximately 400 members. American Association for Small Property Owners' goal is to restore common sense and equity to federal, state and local regulations, tax and liability and other laws that unduly impinge on the right of small property owners to build wealth with real estate.

American Policy Center is a non-profit, grassroots action and education foundation. It has approximately 70,000 individual members. American Policy Center's mission, in part, is to enhance national awareness of crucial global and domestic property rights issues.

Chicago Creative Investors Association is an association providing education opportunities for real estate investors in the greater Chicago area. Chicago Creative Investors Association has approximately 300 members.

Homeowners against Rent Kontrols is a non-profit association of small rental building owners in New York City. It has approximately 40 members. Homeowners against Rent Kontrols' mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Houston Property Rights Association is a non-profit, incorporated association of small business people in the greater Houston area. It has approximately 70 members. Houston Property Rights Association's mission, in part, is to fight against unreasonable government intrusions into citizens' rights to hold and use private property.

Illinois Rental Property Owners Association is an organization of rental property owners, investors and managers from Illinois. It has 18 member organizations from around the state, comprising approximately 2000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Maine Conservation Rights Institute is a non-profit organization committed to the application of innovative conservation methods within the context of private property and free market systems. It has approximately 900 associates. Maine Conservation Rights Institute's mission, in part, is to educate the public as to their constitutional property rights.

Property Owning Women is a non-profit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Property Rights Foundation of America is a tax-exempt incorporated association with 1500 members. It represents private property owners nationally. Among its objectives is to promote the fundamental constitutional right to own and use private property.

Virginians for Property Rights is a non-profit umbrella group for grassroots organizations across the Commonwealth of Virginia. It has approximately 350 supporters. Through education, Virginians for Property Rights seeks to protect private property rights, ensure that protective legislation is accurately applied, and promote a balanced conservation approach to preservation and environmental issues

These organizations seek to bring to the Court's attention its views and those of its supporters concerning the scope of the Takings clause under the Fifth and Fourteenth Amendments to the U.S. Constitution. That issue is of significance to the members of these organizations as well as to property owners generally. Amici Curiae believe that the brief submitted herewith may provide an additional perspective which may aid the Court in determining whether to grant the petition for writ of certiorari.

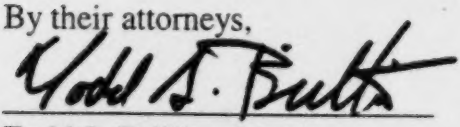
CONCLUSION

For the reasons stated above, American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America and Virginians for Property Rights, respectfully request that this Court grant Amici Curiae leave to file the attached brief in support of the petition for a writ of certiorari.

Respectfully submitted,

American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America and Virginians for Property Rights,

By their attorneys,



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DATED: Boston, Massachusetts: November 7, 1997

QUESTIONS PRESENTED

1. Whether, in denying his application to extract loam, sand and gravel, the Cape Cod Commission took Mr. Daddario's mineral estate without just compensation

2. Whether, in denying his application to extract loam, sand and gravel, the Cape Cod Commission partially took Mr. Daddario's property without just compensation.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of ten organizations (collectively "Amici" or "Amici Curiae").[1] Unless reversed, the Supreme Judicial Court for the Commonwealth of Massachusetts' decision will adversely impact the interests that each organization seeks to promote.

American Association for Small Property Owners is a national grassroots organization of small property owners. Currently, it has approximately 400 members. American Association for Small Property Owners' goal is to restore common sense and equity to federal, state and local regulations, tax and liability and other laws that unduly impinge on the right of small property owners to build wealth with real estate.

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Homeowners against Rent Kontrols is a non-profit association of small rental building owners in New York City. It has approximately 40 members. Homeowners against Rent

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1. Pursuant to Supreme Court Rule 37.6, Counsel for Amici state that neither counsel for Petitioner nor Respondent authored this brief in whole or in part.

Kontrols' mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Houston Property Rights Association is a non-profit, incorporated association of small business people in the greater Houston area. It has approximately 70 members. Houston Property Rights Association's mission, in part, is to fight against unreasonable government intrusions into citizens' rights to hold and use private property.

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Virginians for Property Rights is a non-profit umbrella group for grassroots organizations across the Commonwealth of Virginia. It has approximately 350 supporters. Through education, Virginians for Property Rights seeks to protect private property rights, ensure that protective legislation is accurately applied, and promote a balanced conservation approach to preservation and environmental issues.

Unless reversed, the interests that these organizations seek to promote will be adversely affected by the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts. Thus, Amici are concerned with the key issue in this case: the scope of the Takings clause under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Pursuant to Supreme Court Rule 37.2, counsel for Amici, who are employed by the New England Legal Foundation, have attempted to secure written consent for the filing of this brief from counsel for Petitioner and Respondent. Although Petitioner Francis E. Daddario granted such consent, Respondent Cape Cod Commission withheld it. Accordingly, counsel for Amici has filed, and bound with this brief, a motion for leave to file an Amici Curiae brief.

STATEMENT OF THE CASE

Amici accept and adopt the Petitioner Francis E. Daddario's Statement of the Case. *See* Daddario Petition for Writ of Certiorari ("Writ") at 4-7.

SUMMARY OF ARGUMENT

The Cape Cod Commission ("Commission") took private property without providing just compensation through its denial of a permit to extract loam, sand and gravel from Francis E. Daddario's Falmouth, Massachusetts land. Specifically, this Court should find that (1) the Commission's action took Mr. Daddario's mineral estate without just compensation or, in the alternative, (2) the Commission's action *partially* took Mr. Daddario's property without just compensation.

ARGUMENT

I. IN DENYING HIS APPLICATION TO EXTRACT LOAM, SAND AND GRAVEL, THE CAPE COD COMMISSION TOOK MR. DADDARIO'S MINERAL ESTATE WITHOUT JUST COMPENSATION.

Under Massachusetts law, a landowner's mineral estate is treated as a separate estate in land. "'Minerals, mines, quarries and other similar portions of the estate may be conveyed even in fee, while the rest is retained.'" *Gray v. Handy*, 349 Mass. 438, 441 (1965) (citing cases). As such, mineral estates are distinct property interests entitled to separate constitutional protections. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991). These protections should be similar in kind and degree to those afforded to surface estates.

The question is whether those protections should apply to this case. Specifically, the proper inquiry is whether the Cape Cod Commission's denial of Mr. Daddario's application to extract loam, sand and gravel from his property constituted a taking of his mineral estate. *Lucas v. South Carolina Coastal*

Council provides some guidance in answering this inquiry. 505 U.S. 1015 (1992). The *Lucas* Court suggested a test that should be bifurcated. 505 U.S. at 1016 n.7.

First, a court should determine whether an estate is recognized as a property interest under State law. *Id.* In examining the landowner's reasonable expectations, the proper inquiry is "whether and to what degree the State's law has accorded legal recognition and protection" to the owner's specific property. *Id.* This Court has long "evaluated takings claims by reference to the units of property defined by state law." *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 518-19 (1987) (Rehnquist, C.J., dissenting).

As stated above, Massachusetts has defined a landowner's mineral estate as a separate estate in land. *See Gray*, 349 Mass. at 441. Much like the coal in Pennsylvania, the loam, sand and gravel on Cape Cod is an "identifiable and separable property interest." *Keystone Bituminous Coal Association*, 480 U.S. at 517 (Rehnquist, C.J., dissenting). And, similar to coal, the "bundle" of rights in these substances are "sparse." *Id.* The right to loam, sand and gravel is essentially the right to extract it. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("'For practical purposes, the right to coal consists in the right to mine it.'").

Second, a court should determine when government regulation "goes too far" and constitutes a taking. *Lucas*, 505 U.S. at 1016 n.7; *Pennsylvania Coal Co.*, 260 U.S. at 415. The *Lucas* Court phrased that question as follows: whether the property owner has been "depriv[ed] of all economically feasible use" of his property. *Lucas*, 505 U.S. at 1016 n.7.

Although the Court did not clearly define the phrase "deprivation of all economically feasible use," this case

presents the opportunity to provide the needed clarity. *Id.* ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."). As in *Lucas*, the mineral estate here has a "rich tradition of protection at common law." *Id.*; *Gray*, 349 Mass. at 441. The trial court in *Lucas*, however, found that the regulation left each of Mr. Lucas's beachfront lots without economic value, 505 U.S. at 1016 n.7, while the SJC found, *see* discussion *infra* at 7-8, that the Commission's action left Mr. Daddario's property as a whole with significant economic value. *Daddario v. Cape Cod Commission*, 425 Mass. 411, 417-18 (1997), Writ at 9a-10a. That finding belies this Court's discussion in footnote 7 of *Lucas*, the rich tradition in the Commonwealth of providing protection to separate mineral estates and, as seen below, the fact that the entire mineral estate here was taken. *Daddario v. Cape Cod Commission*, Misc. Case No. 215603 (Land Ct. 1996), Writ at 21a-29a.

Based on the facts as presented in his brief, Mr. Daddario has been deprived of "all economically feasible use" of this separate estate. *See Lucas*, 505 U.S. at 1016 n.7; Writ at 4-7. The only alternatives to his proposal for mineral extraction of sand and gravel were patently violative of the applicable Zoning By-Law. *Daddario*, Misc. Case No. 215603 (Land Ct.), Writ at 21a-29a. Accordingly, the Commission's denial of Mr. Daddario's permit application for the extraction of loam, sand and gravel constituted a categorical taking of his mineral estate in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution because there is no other economically feasible use for that estate. *See Lucas*, 505 U.S. at 1018-20.

The SJC, however, failed to examine the Commission's actions and the nature of Mr. Daddario's property in the above

manner, i.e., it did not acknowledge that the mineral estate was a separate estate under Massachusetts law; that that estate was categorically taken by the Commission's action because it could no longer be mined; and, accordingly, Mr. Daddario was entitled to compensation. Instead, the SJC looked at his property as a whole and held that the remaining surface estate had substantial value as conservation land or for residential use. *Daddario*, 425 Mass. at 417-18, Writ at 9a-10a. This decision contradicts prior Massachusetts precedent, *see Bates Sand & Gravel Co. v. Commonwealth*, 380 Mass. 933, 933-34 (1980).

In *Bates*, the SJC found that upon a taking by eminent domain of the surface and mineral estates, the owner of a mineral estate is entitled to a separate and distinct claim for compensation. 380 Mass. at 933 n.1 & 934. Hazel L. Sawyer, the owner of the surface estate, granted Bates Sand & Gravel a right of entry; a right to remove sand, gravel, and stone; and a right to participate in the profits derived from the extraction of those materials. *Id.* at 934. The court held that Bates Sand & Gravel therefore owned a profit *à prendre* and not a mere license. *Id.* Accordingly, the company held a "compensable interest" when the property was taken by eminent domain by the Commonwealth and it could participate as a party-plaintiff in the compensation proceedings along with Ms. Sawyer. *Id.* at 933 n.1 & 934.

In addition to contradicting this Massachusetts precedent, the SJC's decision conflicts with two recent Circuit Court pronouncements. In *Whitney Benefits*, the Federal Circuit rejected the SJC's "property as a whole" concept. 926 F.2d at 1174. It held that when examining whether government action took a mineral estate, the proper inquiry is what the value of the mineral estate was before and after the action. *Id.* The residual surface estate does not enter into the calculus. *Id. Accord Florida Rock Indus. v. United States*, 18 F.3d 1560, 1568 (Fed.

Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

II. IN DENYING HIS APPLICATION TO EXTRACT LOAM, SAND AND GRAVEL, THE CAPE COD COMMISSION PARTIALLY TOOK MR. DADDARIO'S PROPERTY WITHOUT JUST COMPENSATION.

The Commission's denial of Mr. Daddario's application for a permit to extract loam, sand and gravel from his property has caused him to lose a substantial portion of the value of his property as a whole. Even though the Land Court made no specific factual finding regarding the value of Mr. Daddario's mineral estate, based on the uncontroverted testimony of Mr. Daddario's expert as to the value of the property as a sand and gravel mine, the Commission's expert estimated the loss to be approximately 78% of the property's value. *See* Writ at 6. Such evidence should be sufficient to find that a taking has occurred. The taking of part, but not all, of the economic use of a piece of property may constitute a compensable taking. *See, e.g., Yancey v. United States*, 915 F.2d 1534, 1539, 1542 (Fed. Cir. 1990) (property was taken even though after the governmental action approximately 23% of the property's value remained).

The SJC, however, held that Mr. Daddario's property has significant value as conservation land or for residential use. *Daddario*, 425 Mass. at 417-18, Writ at 9a-10a. Thus, the court concluded that the Commission did not take Mr. Daddario's property. *Id.*

The SJC's holding conflicts with those of other courts. For instance, in *Yancey*, the United States Department of Agriculture imposed a poultry quarantine on two turkey farmers. 915 F.2d at 1536. The Federal Circuit held that the government's action constituted a taking, even though the $91,000 property, turkey breeder stock, was still worth just

under $21,000, after the stock was sold for slaughter. *Id.* at 1539, 1542. The *Yancey* court found that, in examining the property after the offending government action, there was no magic number or percentage of value remaining above which no taking had occurred. *Id.* at 1540. *Accord Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (sale of property for $800,000 more than the original purchase price is not dispositive on the economic impact analysis for taking purposes). Instead, a court must weigh numerous factors including the percentage of diminution in value, "adverse economic impact and unanticipated deprivation of an investment backed interest." 915 F.2d at 1541-42.

Because the loss of the mineral estate here results in a diminution in value of the property as a whole of approximately 78%, based on uncontroverted testimony and the Commission's own estimates, its actions have resulted in a partial taking of Mr. Daddario's property. *See* Writ at 6. He is entitled to compensation for that partial taking. *See, e.g., Yancey*, 915 F.2d at 1539-1543.

Such a conclusion is consistent with public policy. As this Court stated 75 years ago, when the "seemingly absolute protection" of the Takings clause "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co.*, 260 U.S. at 415. Justice Holmes warned, however, that that cannot be accomplished through a regulation that goes too far "under the Constitution of the United States." *Id.* Otherwise, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

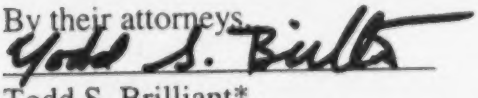
CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America and Virginians for Property Rights,

By their attorneys,



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